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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE # 76-344

W.C.B.# 985377

McKINLEY SALYERS

APPELLANT

VS:

EVANS & DIXON CORE DRILLING
COMPANY, INC. and KENTUCKY
WORKMEN'S COMPENSATION BOARD

APPELLEES

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE W. D. HAZELRIGG, JUDGE

FILED

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SUPREME COURT

BRIEF FOR APPELLANT
McKINLEY SALYERS

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This is to certify that pursuant to RCA 1.250,
a copy of the within Brief has been served by
mail on the Hon. William L. Huffman, Director,
Workmen's Compensation Board, Frankfort, Kentucky;
and Hon. John V. Porter, Wells, Porter & Schmitt,
Attorneys for Evans & Dixon Core Drilling
Company, Inc., 80 Main Street, Paintsville,
Kentucky 41240 on this the 26 day
of ~~February~~ ^{March}, 1976.


COUNSEL FOR THE APPELLANT

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
STATEMENT OF QUESTIONS PRESENTED	11
STATEMENT OF THE CASE.	1
ARGUMENT	1
I. IS THE WORKMEN'S COMPENSATION BOARD CORRECT IN DENYING THE CLAIMANT WORKMEN'S COMPENSATION BENEFITS BECAUSE HE TEMPORARILY HAS FOUND EMPLOYMENT WHICH BECAUSE OF THE FAVORABLE LABOR MARKET WAS PAYING HIM WAGES EQUAL TO OR BETTER THAN WHAT HE MADE AT THE TIME OF THE ACCIDENT?	1
OSBORNE VS. JOHNSON 432 SW 2d 800.	2
CODEL CONSTRUCTION COMPANY VS. DIXON 478 SW 2d 703 (1972)	4
CONCLUSION	4

STATEMENT OF QUESTION PRESENTED

1. IS THE WORKMEN'S COMPENSATION BOARD CORRECT IN DENYING THE CLAIMANT WORKMEN'S COMPENSATION BENEFITS BECAUSE HE TEMPORARILY HAS FOUND EMPLOYMENT WHICH BECAUSE OF THE FAVORABLE LABOR MARKET WAS PAYING HIM WAGES EQUAL TO OR BETTER THAN WHAT HE MADE AT THE TIME OF THE ACCIDENT?

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BRIEF FOR APPELLANT
McKINLEY SALYERS

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This case is on appeal to the Supreme Court from a judgment of the Johnson Circuit Court affirming an adverse decision by the Workmen's Compensation Board dated July 22, 1974, upon the claim of the Plaintiff for workmen's compensation benefits in accordance with the provisions of the Kentucky Workmen's Compensation Law.

ARGUMENT

1. IS THE WORKMEN'S COMPENSATION BOARD CORRECT IN DENYING THE CLAIMANT WORKMEN'S COMPENSATION BENEFITS BECAUSE HE TEMPORARILY HAD FOUND EMPLOYMENT WHICH BECAUSE OF THE FAVORABLE LABOR MARKET WAS PAYING HIM WAGES EQUAL TO OR BETTER THAN WHAT HE MADE AT THE TIME OF THE ACCIDENT.

Although the plaintiff produced a plethora of medical depositions in support of his claim for disability and although the only evidence in the record contradictory to these depositions was the deposition of Dr. T. R. Miller of Lexington, Kentucky, who examined the plaintiff for the sole purpose of giving a deposition stating that the plaintiff was not injured or disabled, the Board nevertheless found against the Plaintiff on his claim for permanent disability benefits and awarded him only temporary benefits, solely on the narrow ground that the plaintiff through a stroke of good fortune had been able to obtain a job subsequent to his injury in which he was temporarily earning more money, although the job was different in kind and required less manual dexterity or ability than his previous job. In limiting the plaintiff's award to one of temporary benefits, the Workmen's Compensation Board held as follows:

"The plaintiff injured his back on June 29, 1972 and was off from work for five (5) weeks. Thereafter, he became employed as an electrician at wages greater than what he was earning on the date of the accident. From the entire record the Board finds that the plaintiff was temporary (sic) totally disabled for a period of five weeks from June 29, 1972, and thereafter suffered no disability so as to impair his future earning capacity. (Workmen's Compensation Board's Order, page 1).

Such an outrageous statement, so incorrect and erroneous in its application of Kentucky Law, would hardly be imagined to appear in an Opinion written by a member of the Workmen's Compensation Board. The Board's decision, holding that, simply because the Plaintiff was temporarily able to earn more money than he had been making before his injury that he thereby "suffered no disability so as to impair his future earning capacity", is directly contrary to the rule laid down by the Court of Appeals of Kentucky in the landmark case of OSBORNE V. JOHNSON, 432 SW 2d 800, and reveals a basic misconception expressed in the Board's Opinion, of the very theory of Workmen's Compensation Law.

The compensation of injured workers, is based upon their loss of earning capacity, and not merely lost wages themselves. To hold that a man suffered no permanent occupational disability, that is, a loss of earning capacity looking to the future, simply because that for the passing moment he is able to earn as much money, or even more money, than he did before he was injured, which is what the above quoted portion of the Board's Opinion reveals that the Board itself

seemed to say in this case, presents an invalid conclusion as to the workings of our compensation law, which conclusion was specifically overruled in the case of OSBORNE V. JOHNSON, 432 SW 2d 800 (1968). In the Osborne case, the Court of Appeals specifically rejected the notion (which was unfortunately repeated in the Workmen's Compensation Board's Opinion as quoted above in this case) that a workman's current good fortune of being able to earn wages equal to or more than he had before the injury is somehow related to the question of whether his overall and long term earning capacity has been impaired by his injury. If this misconception of the law which was rejected in Osborne but has raised its ugly head here in the Workmen's Compensation Board's Opinion was permitted to stand, then a workman could be denied benefits for an injury he suffered merely if fluctuations in economy were to raise his pay for a position that the workman was able to hold even though disabled to perform his former occupation. This notion, too, was specifically rejected in OSBORNE VS. JOHNSON.

In OSBORNE VS. JOHNSON, the Court of Appeals, in a well-written opinion by Commissioner Cullen, stated its position in the following manner:

"From the foregoing discussion a conclusion would seem to be that if the injured workman for the present time can earn the same wages as before being injured, he is not disabled at all for Workmen's Compensation purposes. However, we believe that to adopt such a proposition would be to treat earning capacity as static and perfectly measurable (which of course it is not), and to ignore the attrition from the mere passing of the years." KRS 342.110 requires that consideration be given to the nature of the injury and to the age of the workman. While a workman who has sustained a permanent bodily injury of appreciable proportions may suffer no reduction of immediate earning capacity, it is likely that his ultimate earning capacity will be reduced either by a shortening of his worklife or a reduction of employment opportunities through a combination of age and physical impairment. Accordingly, it is our opinion that in those instances in which the workman has sustained no loss of immediate earning capacity but has incurred a permanent injury of appreciable proportion, the Workmen's Compensation Board, under KRS 342.110 can and should make an allowance for some degree of permanent partial disability on the basis of the probability of future impairment of earning capacity as indicated by the nature of the injury, the age of the workman, and other relevant factors." 432 SW 2d 804. (Emphasis added).

The Court of Appeals went on in its decision, to give some evidence as to the situation, encountered here, where the injured workman was actually able, temporarily and fortunately for him, to earn higher wages after he was injured and before, even though the job at which he was working after his injury was able to be performed, for the time being, even under the handicaps and limitations that he had suffered by his injury. There again, the Court of Appeals wrote that-

"We desire to make clear that as concerns determination of the workman's post-injury earning capacity, it is to be based upon normal employment conditions. As said by Larson: "The essence of the test is the probable dependability with which the claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the super-human efforts of the claimant to rise above his crippling handicaps. Larson's Workmen's Compensation. Volume II. Section 57.51 432 SW 2d 804."

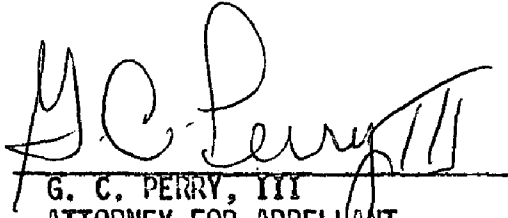
It is clear that in basing its determination that the claimant had sustained no permanent disability in the sense of a limitation upon his earning capacity, the Board pursuant to the passage of its Opinion quoted above, made its determination solely upon the fact that the claimant had been able to earn money and earn more money after his injury than before. This kind of reasoning, in addition to running directly contrary with the rule established in OSBORNE VS. JOHNSON, also is in contravention of the rule which prevents physicians testifying before the Board from basing their disability determinations upon the plaintiff's current earnings. See, for example, the case of CODEL CONSTRUCTION COMPANY VS. DIXON, 478 SW 2d 703. (1972). While the plaintiff cheerfully admits that the Opinion by Justice Palmore in that case, limited to its facts, condemns the faulty rationalization on the part of physicians only, it is only submitted that the use of exactly the same sine qua non, in this case by the Workmen's Compensation Board itself, is and should be highly condemned under the provisions of our law.

For the foregoing reasons, it can be seen that the Workmen's Compensation Board erroneously interpreted the law in writing its decision in the case of McKinley Salyers, and failed to follow the mandate and the rule established in the case of OSBORNE VS. JOHNSON, because it attempted to make a determination of disability under the Workmen's Compensation Law, solely upon the basis of the claimant's current earnings, while ignoring the basic and fundamental question of the extent of the impairment of the claimant's earning capacity.

CONCLUSION

For the foregoing reasons, the plaintiff respectfully prays for an Order of this Court reversing the Opinion and Award of the Workmen's Compensation Board, insofar as it fails to provide for an award of permanent-partial disability benefits to the plaintiff, McKinley Salyers, and for an order of this Board directing the Workmen's Compensation Board to enter an award of permanent-partial disability benefits, based upon the abundant medical evidence of such disability in the record.

RESPECTFULLY SUBMITTED,


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